SUPREME COURT, U. S.

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Supreme Court of the United States

October Term 1964

No. 885

CORO, INC.,
Petitioner,
against

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Statement

This brief is submitted in reply to the brief in opposition of the respondent Federal Trade Commission.

ARGUMENT

The respondent's brief exhibits a basic misunderstanding of petitioner's contentions. This can be ascertained from respondent's restatement, on page 6 of respondent's brief, of what it considers to be "petitioner's principal complaint." Thus, petitioner does not contend, as respondent asserts, that the Commission's order is too broad

simply because petitioner's "unlawful acts had been limited to sales to catalog houses." Rather, petitioner contends that, based upon the Court of Appeals for the First Circuit's own findings of fact, there is no justification for a broad order in this particular case. That the unlawful acts were here limited to a specialized extremely narrow segment of Coro's business is but one of the facts militating against the need for a broad order herein.

We submit that the decisions of this Court and the Court of Appeals for the Second Circuit require a reviewing court to weigh all the circumstances in a particular case in order to determine the required scope of the order in that case. It is this duty which the First Circuit entirely failed to perform, thus abdicating its reviewing function.

Repondent's basic misconception is further evidenced by the contention on page 7 of its brief that all fictitious pricing is but a single practice and hence that the Commission's order is proper. Respondent contends that no matter what kind of fictitious pricing is involved, and no matter what the factual context of the proven fictitious pricing may be—all fictitious pricing is the proper subject matter of an order. In short respondent asserts that *any* fictitious pricing warrants enjoining *all* fictitious pricing. But it is just as persuasive to argue that any refusal to bargain warrants enjoining all refusals to bargain, *NLRB* v. *Express Publ. Co.*, 312 U. S. 426 (1941) (such an injunction denied); that any secondary boycott warrants enjoining all secondary boycotts, *Communications Workers* v. *NLRB*, 362 U. S. 479 (1960) (such an injunction denied); that any mislabeling warrants enjoining all mislabeling, *Country Tweeds, Inc.* v. *FTC*, 326 F. 2d 144 (2nd Cir. 1964) (such an injunction denied); or that

receiving any discriminatory allowance warrants enjoining receipt of all discriminatory allowances, *R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445 (2nd Cir. 1964) (such an injunction denied); *Grand Union Co.* v. *FTC*, 300 F. 2d 192 (2nd Cir. 1962) (such an injunction denied); and that therefore any specific act warrants a generic order.

As noted, in every case cited above, such contentions were rejected by this Court and the Second Circuit. Instead the courts in those cases examined the factual situation presented in order to determine the breadth of the order necessary to prevent future unlawful activities. The scope of the order in those cases was not dictated by the ability to provide a pat label for the proven unlawful activity, but rather by the actual necessities of the factual situation presented.

The same misconception is again sharply evident at page 8 of respondent's brief, where an attempt to support the Commission's order herein is made by pointing to a similar order which was approved in another "fictitious pricing" case, *Baltimore Luggage Co.* v. *FTC*, 296 F. 2d 608 (4th Cir. 1961), cert. denied, 369 U. S. 860 (1962). Obviously, the type of order that was appropriate in the *Baltimore Luggage* case is not necessarily the same type of order which may be needed in another case with an entirely different set of circumstances. We are not objecting to the order herein *per se*. We are objecting to that order being entered in this case in view of *this* case's factual circumstances. The propriety of the instant order must be determined in light of this case's facts, not in light of an order in another case with different facts.

In point of fact the circumstances in *Baltimore Luggage, supra*, are totally different from those present herein. *Baltimore Luggage* engaged in a myriad of

fictitious pricing devices, ranging from false pre-ticketing to catalogue inserts. Its activities were not limited to a small segment of its business in a distinct industry. Instead, fictitious pricing was endemic throughout its entire business. In such a situation a broad order might well be necessary. But that does not demonstrate that the same order is required to be entered against a company which engaged in a single limited catalogue insert practice and then only in less than 1% of its business.

While on the one hand respondent cites the *Baltimore Luggage* case with its completely different factual context, on the other, it attempts to distinguish all of the cases cited in the petition on the grounds that they involve "acts and practices wholly dissimilar from those involved in the instant proceeding." Such a distinction completely misreads these authorities. In the cases cited by petitioner, this Court and the Second Circuit set forth certain criteria for determining the appropriate scope of an administrative agency's order. The factors that those opinions considered important in determining the proper scope of an order, are precisely the factors which here dictate a narrow order. These cases were clearly meant to have general applicability to all administrative agency orders, regardless of the actual subject matter involved. These cases dictated an approach to administrative orders that was completely ignored in the instant case.

Respondent's brief never discusses the decisions of this Court which, we submit, are in conflict with the decision of the First Circuit herein. On page 8 of its brief respondent cites four decisions of this Court which it contends support the decision of the First Circuit: *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608 (1946); *FTC* v.

Henry Broch & Co., 368 U. S. 360 (1962); *FTC* v. *Mandel Bros., Inc.*, 359 U. S. 385 (1959); *FTC* v. *Ruberoid Co.*, 343 U. S. 470 (1952). But, three of these four decisions (*Siegel, Broch* and *Mandel*) were discussed at pages 12 through 15 of the petition herein and were there shown to support petitioner's contentions that the order of the First Circuit is in conflict with the decisions of this Court. Respondent does nothing but cite these three cases and accordingly we need not repeat the detailed analysis of these cases contained in the petition. The fourth case, *Ruberoid*, did not involve an FTC order which could have been punishable by a contempt proceeding. Thus, in accordance with the distinction set forth in the *Broch* case, *supra*, the order in *Ruberoid* is not an applicable precedent herein.

Nowhere in respondent's brief does it ever attempt to rebut petitioner's contentions, (i) that the Court below entirely failed to make a determination of whether the scope of the order herein was justified in the light of the circumstances of this case, and (ii) that the circumstances of this case preclude the need for an order of broad scope, and hence the order would properly have been narrowed if the Court below had not abdicated it reviewing function.

The decisions of this Court and those of the Second Circuit require a type of review which the Court below refused to perform, and hence that Court's determination is in conflict with this Court's decision and those of the Second Circuit.

CONCLUSION

For all the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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